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No. 86-1870

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ROBERT G. CRONSON, as Auditor General of the State of Illinois, and Individually,

Petitioner,

v.

HONORABLE WILLIAM G. CLARK, Chief Justice, Illinois Supreme Court, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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I.

INTRODUCTION

The Illinois Supreme Court does not respond to the petition for certiorari nor have its Chief Justice and five of its six associate justices done so. Only Associate Justice Seymour Simon filed a Responsive brief urging denial of the writ. In his brief, Respondent Simon is basically inconsistent with his prior positions and contentions in *Madden* below.

Early in that case, he *dissented* from the denial by the Illinois Supreme Court in its order of May 14, 1986 of Cronson's Motion to Dismiss on due process grounds. Even more contradictory of his present position was Respondents' criticism of the self-initiated aspects of the *Madden* case, in his special and concurring opinion therein, establishing that the Illinois Supreme Court launched and tried its own lawsuit. (App. A, Pet., pp. 11-13). Among other critical expressions therein at variance with the majority opinion, he said: "It is this appearance of impropriety that makes me uncomfortable and would ordinarily require us to step aside." (App. A, Pet., p. 13). Only by invoking the Rule of Necessity (which the majority opinion declined to do) did Respondent seek to explain his failure to recuse himself.

Petitioner must here reaffirm that in neither of the federal cases below, nor in *Madden*, No. 86-1773, has he sought review of any state issue. He seeks only a fair trial before a fair and impartial court, which is a matter of due process, not of substantive state issue review. However, disregarding the record and pleadings, Respondent asserts:

> "This [Petitioner's contention that only federal issues have been raised] is untrue. In seeking to enjoin the state from ruling on an issue of state law, Petitioner sought to deny the state the right to decide an important state interest."

Thus, Respondent overlooks the fact that no State, even acting through its highest court, has an inherent *right to decide* any question, no matter how substantial the asserted state "interest" or "concern", if in so doing it utilizes a decisional process biased and violative of principles of fair adjudication.

Respondent likewise overlooks the fact that numerous alternative mechanisms for recusal and substitution of a neutral tribunal were suggested in Cronson's Motion to Dismiss which alternatives would have left the matter in "state" hands. It is thus a distortion now to suggest that Cronson seeks herein to defeat "the state's right to decide an important state interest". In his special and concurring opinion below, Respondent viewed it otherwise.

Similar unsupportable arguments are made by the Respondent Madden, agent of the Illinois Court, in his brief in the companion proceeding No. 86-1773. There the Illinois Supreme Court has once again chosen Mr. Madden as its agent, to respond to Cronson's certiorari petition, notwithstanding the fact that Mr. Madden's agency-employee relationship to that court in instituting and conducting the mandamus suit is at the center of the crucial due process issue.

II.

ARGUMENT

A. Petitioner Has Presented Substantial Grounds For Granting The Writ Of Certiorari Herein.

Contrary to Respondent's assertion that "Petitioner simply re-argues the substantive merits of his case below . . . [and] merely claims he has a federal interest at stake" (p. 3), Petitioner has advanced numerous special and important reasons for granting the writ. Petitioner has demonstrated that (a) the Seventh Circuit Court of Appeals handed down a decision ignoring fundamental and relevant decisions of this Court; (b) the case raises unsettled questions of federal law which should now be settled by grant of certiorari, and (c) that the Circuit Court of Appeals, in effect, upheld an extreme departure by the Illinois Supreme Court from "accepted and usual norms of judicial procedure" necessitating exercise of this Court's supervisory powers under Rule 17. To illustrate:

1. The court below ignored as irrelevant *In re Murchison*, 349 U.S. 133, 136 (1955), and its progeny. No teachings of this Honorable Court could be more basic and needful of application than those of *Murchison* in a case such as *Madden*. There due process violations are shown conclusively by the unchallenged assertions of Respondent Simon himself, in his own special and concurring opinion in *Madden*. (App. A to Pet. No. 86-1773, App. pp. 11-12).

2. The novel and astounding suggestion of Respondent, that the Illinois court had a right to adjudicate any substantive "state concerns" and "state issues" free of interference by this Honorable Court, even if the decision-making process violated federal due process (Br. p. 2) ignores both the Fourteenth Amendment and the Supremacy Clause.

3. The decision of the Court of Appeals, in sanctioning the due process violations in *Madden* under the doctrine of abstention, conflicts with the controlling *exception* in *Younger v. Harris*, 401 U.S. 37, 27 L.Ed.2d 669 (1971). *See*, Argument B of this Reply brief, p. 5. In this and other respects, the Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings [and/or] so far sanctioned such a departure . . . as to call for an exercise of this Court's power of supervision." (Supreme Court Rule 17(a)).

4. In narrowly interpreting the disqualifying interest of a biased court, as one limited essentially to "dollars and cents" financial matters, both opinions of the courts below, i.e., the Circuit Court of Appeals and the Illinois Supreme Court, disregard the teachings of *Aetna Life Insurance Co. v. Lavoie*, ____ U.S. ____, 89 L.Ed.2d 823, at 838 (1986), as emphasized in the concurring opinion of Mr. Justice Brennan. Logic dictates that *any* interest sufficient to upset the balance of fair decision-making is disqualifying.

5. The underlying concept of the court below revealed in Respondent's brief seems to be that when a state supreme court regulates its bar, that "state interest" is so paramount as even to warrant a high degree of qualification and limitation of basic constitutional rights to a fair trial. This is contrary to *Pulliam v. Allen*, 466 U.S. 522, 80 L.Ed.2d 565 (1984), and other decisions, establishing the authority of the federal judiciary to intervene in state court proceedings when federal constitutional rights are infringed:

> ". . . the very purpose of Section 1983 was to interpose the federal courts between the states and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action

> under color of state law, whether that action be legislative, executive *or judicial.*" (Emphasis added)

80 L.Ed.2d at 579.

Cf., also, *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 84 L.Ed.2d 205 (1985) (State supreme court rule concerning non-resident attorneys violated federal "Privileges and Immunities" clause).

6. So far as is known, no decision of this Court has dealt with the anomalous situation whereby a court, as below, invokes the Rule of Necessity to justify a self-initiated suit brought by its own agent-employee,—thereby seeking to exonerate itself from due process violations which the court itself affirmatively caused. The real question is: "May the Rule of Necessity be employed by a court which called before itself its own cause so as to override the basic due process rights of a litigant to an impartial and unbiased adjudicator?"

This Court recently declared the importance of an impartial adjudicator as going to "the very integrity of the legal system" and declared the right to be a "basic" constitutional right. *Gray v. Mississippi*, ____ U.S. ____, 95 L.Ed.2d 622 at 639 (1987).

B. Contrary To Respondent's Contentions, The Doctrines Of Federal Abstention And Of Comity Do Not Apply.

Respondent misunderstands the entire concept of federal abstention and comity set forth in *Younger v. Harris*, 401 U.S. 37, 27 L.Ed.2d 669 (1971) which rests wholly on the assumption that justice will be done and federal rights upheld in the state forum:

> "Such a course [abstention] naturally presupposes the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved.

> Here, the predicate for a *Younger v. Harris* dismissal was lacking, for the appellees alleged, and the District Court concluded, that the [state tribunal] was incompetent by reason of bias to adjudicate the issues pending before it."

Gibson v. Berryhill, 411 U.S. 564, 577, 36 L.Ed.2d 488 (1973).

The *Younger* doctrine never applies where the state judicial process is itself so seriously flawed that it is inherently incapable of affording a litigant an adequate state remedy. *Middlesex County Ethics Commission v. Garden State Bar Association*, 102 S.Ct. 2515, 73 L.Ed.2d 116, 124 (1982) (litigant must have meaningful state opportunity to adjudicate constitutional claims); *Gibson v. Berryhill*, *supra*, 411 U.S. at 577; *W.C.M. Window Co., Inc. v. Bernardi*, 730 F.2d 486, 491 (7th Cir. 1984) (*Younger* doctrine inapplicable when state tribunal has pre-judged federal claim) and *United Church of the Medical Center v. Medical Center Commission*, 689 F.2d 693, 697-8 n. 3 (7th Cir. 1982) (abstention no bar when state proceeding "fatally infected" with bias).

The constraints of abstention and federalism do not fit this case. Far from offending the *Younger* doctrine, Cronson *upheld* it by first seeking in the Illinois Supreme Court, a correction of its irregular procedure and substitution of an impartial decision-maker. His motion to dismiss on due process grounds was rejected out of hand (Simon, J., dissenting). In the face of this history of futility, it defies logic for Respondent now to suggest that Cronson had or has an adequate opportunity to pursue his federal constitutional claims in the state forum.

C. The Impact Here Upon Cronson's Liberty And Property Interests Is More Than Sufficient To Confer Standing And To Implicate Due Process Deprivation.

It is ironic that Respondent, having sued Cronson in a self-originated proceeding effectively charging him with nonfeasance in office now argues that he lacks standing to muster a defense or even to complain of obvious infringements of his due process rights. Respondent's suggestion that Cronson has no "liberty" or "property" concerns or that his stake is so tenuous as to compare with that of the plaintiffs in *Allen v. Wright*, 468 U.S. 737 (1984) and *Board of Regents v. Roth*, 408 U.S. 564 (1972) is far-fetched. Both *Allen* and *Roth* are sharply distinguishable on their facts. In *Allen*, the unsuccessful plaintiffs attacking the adequacy of IRS procedures for dealing with tax exempt private schools practicing racial discrimination were unable to show any actual or prospective injury to themselves or even a remote nexus between themselves and any private school. (468 U.S. at 758-759). They were at best "concerned bystanders". (*Id.* at 756). Likewise, in *Roth, supra*, the plaintiff, an untenured college instructor, could make out no conceivable injury to his liberty or property rights simply on the basis that the school had failed to renew his expired employment contract—especially where the employer refrained from any criticisms or charges which ". . . might seriously damage [plaintiff's] standing and associations in his community". (408 U.S. at 573). The situation of Cronson is far different because:

1. Cronson was made the unwilling target of a self-initiated suit by a court determined to rule upon the scope of its own duties as an auditee following a long and heated dispute on the subject. The gist of its own suit was to attack Cronson's performance in his office. Cronson then

rejoined in the only meaningful way he could, namely, by an action under Title 42, Section 1983, not only as an office holder, but *individually*. He did this precisely because he feared that the outcome of the fatally infected procedure would adversely impact him as an individual subjecting him ". . . to the loss [in mid-term] of his public office without due cause or justification . . .". (District Court Complaint at par. 24). Under Illinois law, Cronson can lose his job "for cause" including, ". . . neglect of duty". (Illinois Constitution, Article VIII, Section 3; Illinois State Auditing Act, Section 2-6 (Ill. Rev. Stat. 1985, Ch. 15, Section 302-6)).

The Seventh Circuit Court evidently missed this portion of Cronson's complaint below, since that Court erroneously asserted that "he does not contend that his job is endangered or indeed that he has the kind of job rights that count as property for federal constitutional purposes . . ." 810 F.2d at 665. Thus, the Appeals Court, through possible inadvertence, overrode Cronson's uncontroverted pleading allegations on his personal standing which it should have accepted as true.[1]

While apparently conceding that Cronson did in fact plead the standing allegation which the Appeals Court overlooked, Respondent asserts that: ". . . a threat to his job is far too hypothetical to cure his standing defect . . ." (Br. in Opp. at 6). Respondent adds that there is no indication to date that the Illinois General Assembly has begun any removal proceeding (*Id.*). Thus, Respondent

[1] "For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts *must* accept as true all material allegations of the complaint, and *must* construe the complaint in favor of the complaining party." (emphasis added) *Warth v. Seldin*, 422 U.S. 490, 501, 45 L.Ed.2d 343 (1975).

would have this Court rule that only *an accomplished* injury to "property" rights or "liberty"—not the *threat* of such injury—is sufficient under the due process clause. This is clearly not the law.

In *Gibson v. Berryhill, supra,* plaintiff optometrists, who feared *prospective* loss of their licenses if subjected to a hearing before a biased state tribunal, were held entitled to federal injunctive relief, even though no injury had yet been sustained and it was by no means certain that the state tribunal, if allowed to proceed, would in fact revoke the licenses. (411 U.S. at 578-579). To the same effect, *see, Goldberg v. Kelly,* 397 U.S. 254, 25 L.Ed.2d 287, 292 (1970) where welfare recipients threatened with loss of future relief payments *had standing* to complain of due process violations.

2. Cronson's individual standing is reinforced by the fact that as a licensed attorney, he annually pays substantial fees to the Illinois Supreme Court's Disciplinary Commission, the very fees which that court in *Madden* has sought to exempt from public audit scrutiny and protection. Cronson has a property right to object to this lack of proper stewardship and accountability over his own license fees.

3. Finally, Cronson has special statutory standing under Illinois law[2] which, in turn, applies to federal proceedings under Rule 17(b) Fed.R.Civ.P., to assert the property rights of all Illinois citizens who deserve a proper safeguarding and protection through public audit of all state funds in the hands of all agencies of government.

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[2] ". . . the Auditor General may institute and maintain any action or proceeding to secure compliance with this Act and the regulations adopted hereunder." (Ill. Rev. Stat., Ch. 15, Sec. 303-12).

Plainly, Cronson's interest in the mandamus suit which the Illinois Supreme Court called before itself is hardly imaginary or speculative as that court would now imply.

III.

CONCLUSION

For all of the reasons stated above and in the original petition for certiorari, Petitioner respectfully requests that the writ be issued.

Respectfully submitted,

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